Wometco Coca-Cola Bottling Company of Nashville, Inc. *and* Retail Clerks Union Local 1557, United Food and Commercial Workers International Union, AFL-CIO, CLC. Case 26-CA-8010

March 31, 1981

DECISION AND ORDER

On September 4, 1980, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt her recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wometco Coca-Cola Bottling Company of Nashville, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[2] We have modified the Administrative Law Judge's recommended Order to include a provision that all pertinent records be made available to the Board for the purpose of computing backpay.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: This case was heard before me on February 25-27, 1980, in Nashville, Tennessee, pursuant to a charge filed on August 27, 1979, and amended on September 17 and 26, 1979, and a complaint issued on October 10, 1979. The question presented is whether Respondent Wometco Coca-Cola Bottling Company of Nashville, Inc. (herein called Respondent or the Company) (a) discharged employees David E. Lewis and Tim Ray to discourage membership in Retail Clerks Union Local 1557, United Food and Commercial Workers International Union, AFL-CIO, CLC (herein called the Union or the Retail Clerks), in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (herein called the Act); and (b) in violation of Section 8(a)(1) of the Act, engaged in surveillance over Ray; threatened employees with reprisals for union activities; forbade employees to talk about the Union and engage in union solicitation at times and places when they had a statutory right to engage in such activity; made misrepresentations to employees regarding the use of documents signed by employees at the Union's behest; forced employees to remain isolated; and summoned union activists to exclusive meetings to lecture them about company rules and penalties for violations.

After considering the entire record, including the demeanor of the witnesses, and the briefs filed by Respondent and by counsel for the General Counsel, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation which maintains a facility in Nashville, Tennessee, where it bottles, distributes, and sells soft drinks. Respondent annually sells and ships directly to points outside Tennessee, and annually purchases and receives directly from points outside Tennessee, goods, and materials valued in excess of $50,000. Respondent's gross annual revenues exceed $500,000. I find that, as Respondent concedes, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Company is a wholly owned subsidiary of Wometco Enterprises, Inc. Some of Wometco's subsidiaries have labor unions, but the majority do not.

In 1969, Teamsters Local 327 attempted to organize the Company's employees. In September 1969, the Teamsters called a strike among the Company's employees, in an unsuccessful effort to compel the Company to recognize it without an election. During this strike, which continued until at least February 1970, the Teamsters and the Company each filed a charge against the other, and complaints issued in both cases. The Board found that the Teamsters had violated Section 8(b)(1)(A) of the Act when strikers for whose conduct it was answerable destroyed company property; threatened nonstrikers with violence to them and their wives; assaulted

and damaged nonstrikers' automobiles; threatened and tried to damage the vehicle of some trash collectors; and threatened and blocked a deliveryman who was trying to make a delivery across the picket line. *Teamsters, Chauffeurs, Helpers & Taxicab Drivers Local Union 327, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Coca-Cola Bottling Works of Nashville)*, 184 NLRB 84 (1970). In consequence of the violence during that strike, the Company brought a damage suit against the Teamsters, which admitted damages and settled the case. The complaint against the Company was dismissed. *Coca-Cola Bottling Works of Nashville*, 187 NLRB 102 (1970).

In 1977, the Teamsters conducted another organizing campaign. This time, the Board conducted a representation election which the Teamsters lost by a 2-to-1 margin.[1]

The Company has not been found guilty of an unfair labor practice charge since at least 1965, nor, so far as the record shows, on any earlier occasion.

B. *The Beginning of the Retail Clerks' Campaign in 1979; Alleged Interference, Restraint, and Coercion*

1. The employees' initial contact with the Union

Before the beginning of the workday on August 15, 1979,[2] employees David E. Lewis, Tim Ray, J. T. Kelley, and Butch Midland met in a restaurant and decided to try to obtain union representation. Kelley suggested that a telephone call be made to the AFL–CIO telephone number listed in the telephone directory. A little later that day, Lewis telephoned that number, and told the "lady" on the other end that Respondent's employees wanted to start a union. Lewis had been advised that a number of employees did not want Teamster Local 327 because of the "violence . . . it was known for," or the Teamsters because "they sort of got a bad reputation." Lewis said that the employees were not sure what union they wanted, but they did not want Local 327 or the Teamsters. She gave Lewis the Retail Clerks' telephone number. Lewis then telephoned the Retail Clerks, whose business representative suggested an immediate meeting about getting the campaign started. Ray, who was taking the day off from work,[3] volunteered to meet with the Retail Clerks representative and let the employees know what happened. Later that day, Ray met with Business Representative Turner Williams, who gave Ray an authorization card to sign, and about 100 blank authorization cards and a few pamphlets to distribute among his fellow employees. Still later that day, at or about 2 p.m., Ray obtained the signatures of Lewis and Midland on authorization cards, and gave them a number of blank cards to distribute among their fellow employees. Lewis eventually succeeded in inducing 10 to 14 employees to sign cards. Ray directly obtained signatures from about 6 employees in addition to Lewis and Midland.

2. Alleged surveillance

About August 19 or 20, some of Respondent's employees reported to Herbert E. Dean, who is Respondent's vice president and its general sales manager at its Nashville and branch plants, that other employees were asking them to sign cards, and asked him what they should do about it. Employee Ray's duties required him to make deliveries to retail stores of soft drinks bottled by Respondent. On August 22, Ray ran a route which was run once a week. That morning, while Ray was receiving payment from Galbraith Brothers Grocery (the store which was his second or third stop that day), District Manager John Fann came in and said that he knew he would catch up with Ray sooner or later. Ray asked Fann what he was doing there. Fann replied that he was delivering some soft drinks in a new-sized bottle, which should have been delivered 3 or 4 weeks earlier. Ray asked where Fann was going next, and he said that he was going to White's Market to talk to the owner about putting in a beverage department. Ray and Fann were in the store together for less than 5 minutes. White's Market was Ray's next stop. As he was leaving, he saw Fann again. At or about 1 p.m., at Chamberless Grocery (Ray's fifth or sixth stop), he saw District Manager John T. (Tommy) Weiss. Weiss asked Ray if he were about through, and if he needed help. Ray said that he had three or four more stops, but this was his last big stop, and he could handle the rest by himself. Weiss said, "Okay, that's all I wanted to know," and drove away.

Respondent's answer concedes that Fann and Weiss are both supervisors within the meaning of the Act. Ray reported to both of them. Their duties as district managers require them to spend about 70 percent of their time in the field, and to make frequent visits to grocery stores which sell soft drinks bottled by Respondent. Both of them denied engaging in surveillance over Ray on August 22. Fann testified that he visited White's, a mile and a half from Galbraith's, in order to induce the store to buy a three-door carton cooler. Fann could not recall the last time before August 22, or the first time after August 22, that he saw Ray out on a route or in a store. Weiss testified that he drove up to Chamberless Grocery because he saw Ray's truck parked outside, thought it was the truck of another employee who had a heavy day, and went over to see if Weiss could help him. Weiss further testified that he asked Ray how many more stops he had left because he had started late that day; Ray testified that he did not believe he started late that day. Fann testified that on August 22 he had no knowledge of Ray's union activities, that he did not learn until August 23 about the employees' union activities, that he learned about them from Company President James E. Johnson during a meeting in the salesroom, and that Dean had not previously told him about the employees' union ac-

[1] In describing this election, Herbert E. Dean, who is Respondent's vice president and general sales manager, testified that "the Company won."

[2] All dates hereafter are 1979 unless otherwise stated.

[3] He took the day off in order to look for a better job elsewhere, which he did not find. Ray has no home telephone, and the pay telephone nearest to his house is 5 or 6 miles away. He asked his wife to telephone Respondent from her place of employment that Ray would not be coming in that day. Inferentially, she did so, but did not tell Respondent the real reason for his absence. No contention is made that Respondent knew at any material time why Ray was absent that day, or that his later discharge was motivated in any way by his absence that day.

tivities. Weiss testified that he did not learn about the union campaign until the afternoon of August 23. The district managers' duties include checking up on employees while they are on their routes; but Weiss denied that his presence in the field that day was to check on employees, nor did Fann so attribute his presence in the field on that day.

Between Ray's hire in March or April and the week of his August 24 discharge, he had seen supervisors on his route only twice. Jerrell Kirby, whose duties as a merchandiser require him to spend most of his time in the field, credibly testified that between his March 1978 hire and his February 1980 testimony, District Supervisor Sam Richardson had checked on him in the field two or three times; District Supervisor Weiss had appeared on two occasions, when he helped out Kirby;[4] and, on an undisclosed number of occasions, he had seen Fann working in a store's beverage department and had seen him and Richardson driving on the highway. Phillip Stillwell, a merchandiser for about a year and a half, credibly testified that he ran into district supervisors from one to three times a month in the stores on his route, at lunch, or driving on the highway. Lewis, a merchandiser for about a year, credibly testified that sometimes he would see supervisory personnel on his route once a week, and sometimes once every 2 or 3 weeks.

3. The August 23 speeches

Company Vice President Herbert E. Dean testified that he found out about the union campaign about August 19 or 20, and thereupon discussed it with Company President James E. Johnson. Johnson, Dean, and Marvin J. Krantz (Wometco's Miami-based vice president in charge of personnel and labor relations) all testified that on the morning of August 23, management conducted two meetings, the first one at 6:15 for the cold drink sales department and the second one at 6:30 for the home package sales department. Johnson testified that he gave the same speech on both occasions, and Krantz testified that he himself gave basically the same speech on both occasions.[5] Accordingly, and although all the employees who testified about Johnson's and Krantz' speeches worked in the home package sales department, my findings about what was said will be couched in terms of only one meeting only.

Vice President Dean made a few introductory remarks, the substance of which is not shown by the record.[6] Then, Johnson delivered his speech from notes. He said, *inter alia*, that Respondent had an "important" reason for calling the meeting; namely, that union organizers were trying to organize the plant. Johnson went on to say that Respondent did not want a union because it could cause strikes, which result in loss of pay, and could cause lasting bitterness between the employees and the Company. Johnson asked the employees not to sign a card unless they knew "everything that can be involved," and then mentioned recent large layoffs at an automobile plant and an automotive glass plant in the area.[7] Johnson went on to say that Respondent did not want a union, and would do anything humanly possible, within the law, to keep it out. Johnson said that the employees did not need to pay someone to represent them when "the Company does it for free." He said that the employees had overwhelmingly voted against a union 2 years earlier, and that "the same [obscenity] has started over again, a few people trying to disrupt the lives of many."[8] Johnson said that a certain percentage of employees had to sign cards before an election could be held; that some union organizers and some employees who were posing as union organizers were soliciting cards; that if the employees were approached to sign a card, they had better turn it down; and that, if they had already signed a card, "go back to them and tell them to tear it up, because that's your right." Johnson said that signing a card would not solve the employees' problems, but such problems would only be beginning. He said that signing a card for the Union was like signing your paycheck over to the Union, and that all the cards could do was cause problems for the employees at home or at work, cause trouble to the employees and their families, and break up their families. Johnson went on to say that, if the employees were caught signing cards, or got the Union in, they might lose their benefits or pensions, suffer a pay cut, or lose their jobs. Johnson said that Respondent's plant was a minor part of Wometco's operations, that Wometco could "keep rolling" without it, and that Respondent's plant might be closed down if the Union came in.

Then, Krantz addressed the employees. Krantz said that prices were going up, including the prices of soft-drink ingredients; people had to line up to buy gasoline; people were obtaining no help from the Government or their employers, who had trouble of their own; but a union would not solve the employees' problems either. He said that except for a few unions which had backed President Carter's wage ceilings, the unions were not doing anything for their people right now. Krantz further said that Wometco had many employees, most of them nonunion; that the employees in Wometco's union plants did no better and no worse than those in its nonunion plants; that Respondent had always tried to do everything it could to help the employees and would continue to do so whether or not there was a union campaign or a union representative; that if a union asked for more money which Respondent did not have, "then you'll just be out in the streets"; that a union would demand dues, fines, and assessments; that Respondent felt it would be best if the employees did not get involved with the Union and did not pay for what they already

[4] Although Weiss was not Kirby's immediate supervisor, he had not known this until about January 1980.

[5] In view of their testimony in this respect, it is immaterial whether there were two meetings or one. In any event, I believe that J. T. Kelley, an employee in the home package sales department, was mistaken in testifying that all the employees in both departments attended the 6:30 meeting attended by him.

[6] This finding is based on Johnson's and Dean's testimony. I believe employees Kelley, Stillwell, and Lewis were mistaken in testifying that Johnson started the meeting.

[7] Johnson testified that he believed both of these plants to be unionized. However, there is no evidence that he so advised the employees in terms.

[8] I accept Johnson's version of the obscenity, but regard its exact phrasing as immaterial.

had; and that he would do everything he could to keep the Union out. Further, Krantz said that he knew what a union could do to a company, that he saw companies destroyed by unions and that is what it would do to Respondent.[9] At the end of Krantz' speech, Dean made a few closing remarks, the substance of which is not shown by the record.

My findings as to the content of Krantz' speech are based on a composite of credible parts of the testimony of Krantz and employees Kelley, Kirby, Lewis, Stillwell, and Ray. For demeanor reasons, and Lewis' testimony aside (*supra*, fn. 9), I accept Krantz' denial that he threatened employees with plant closure if they supported the Union, or threatened employees with discharge for signing union cards, and discredit Kelley's testimony otherwise. Also, for demeanor reasons, I do not accept employee Kirby's testimony that Krantz said Respondent was going to do everything in its power to keep the Union out "no matter what it takes," or (laying to one side Krantz' remarks to the effect that the employees would have to pay a union but it would not cause Respondent to treat them better), Kirby's testimony that Krantz said a union would make things worse.

My findings as to the content of Johnson's speech are based on a composite of credible parts of the testimony of Johnson, Ray, Kelley, Kirby, Lewis, and Stillwell. Johnson and Krantz both testified that Johnson reviewed with Krantz the notes which Johnson used in delivering his speech, and that Krantz was present during the speech; and Johnson testified, in effect, that Dean was also present; but Krantz and Dean were not asked what Johnson actually said during this speech.[10] On the basis of these notes, Johnson gave at the hearing what he testimonially alleged to be the entire content of his speech. Johnson further testified that his speech consumed 5 to 10 minutes. His speech as allegedly redelivered at the hearing *in toto* is about 300 words long. Although Johnson is a rather slow-spoken man, I cannot believe that in giving this speech he delivered only one word every one or two seconds. Accordingly, while I believe that he in fact made the remarks to which he testified, I do not believe his testimony that he said nothing else. For these and demeanor reasons, I accept the previously summarized employee testimony about what else he said, and discredit his denials (uncorroborated by Krantz or by Dean, who were also present) that he threatened employees with discharge, loss of benefits, or plant closure if they supported the Union.

C. *Alleged Additional Interference, Restraint, and Coercion; the Allegedly Discriminatory Discharge of Tim Ray*

When hired by Supervisor Russell Bedwell in March or April, Tim Ray was told that Respondent was a nonunion company and preferred to stay that way. As previously noted, he was the first employee who signed a union card and obtained cards for others to sign. He directly induced about eight other employees to sign, including one or two one evening in Respondent's parking lot.

On August 23 he reported to work with a painful shoulder which he had injured on the job. Bedwell told him to defer seeing the nurse until after the meeting, described above, where Jones and Krantz urged the employees to reject the Union, and Johnson said, *inter alia*, that employees might lose their jobs if they were caught signing union cards. Then it transpired that the nurse was on vacation, and Personnel Manager Jack Johnson drove Ray to see Respondent's doctor. The doctor told Ray that he had a strained muscle, told him to keep heat on it, and gave him a prescription for a "muscle relaxer," and gave him a slip stating that he could return to work.

After Johnson had driven Ray back to the plant, Ray gave Bedwell the doctor's slip. Johnson told Bedwell to use Ray on whatever job would be the least strenuous. Bedwell said that all the jobs were about equally strenuous, and asked Ray how his shoulder felt. Ray said that it still hurt. Bedwell told him to go home and rest his shoulder, and "see how it feels in the morning."

After leaving the plant, Ray stopped off at Union Representative Williams' office to tell him about the meeting with President James Johnson and Krantz. Ray told Williams that Johnson had said some people would lose their jobs over the union cards, and that Ray was afraid of losing his job. Williams suggested that Ray's job might be protected by the creation of positive proof, by means of a mailgram to Respondent stating that Ray was a volunteer organizer, that Respondent knew about Ray's union activity. Ray thereupon signed a volunteer organizer form and authorized Williams to send the mailgram. Early in the afternoon of August 23, this mailgram was telephoned into President Johnson's office. After leaving Williams' office, Ray went home and rested and applied heat to his shoulder, but did not have the prescription filled because he felt he could not afford it.

After Respondent had received this telephoned mailgram, Dean telephoned Krantz, who instructed Dean to call Ray to Dean's office and read the following statement to him:

> I want to inform you of the Company's rights, and what the Company expects of you. You will be treated the same as any other employee. Federal law prohibits the distribution of union literature in working areas, and on working time. If you do not comply with this, we will be forced to take disciplinary action against you. Also, the law provides that there shall be no solicitation of union cards on working time or in working areas.

About 6:15 a.m. on August 24, and after receiving these instructions from Krantz, Dean asked Bedwell to have Ray wait in Bedwell's office until "we" had an opportunity to talk to him.

Ordinarily, before Respondent's employees leave on their routes, they congregate in the salesroom or the breakroom, and at these locations they receive any remarks which management wishes to direct to them. Ray clocked in at 6:21 a.m. on the morning of August 24 and

[9] My finding in this last sentence is based on employee Lewis' credited testimony. The General Counsel in effect disavowed any contention that Lewis had testified to a threat by Krantz.

[10] Nor were Johnson and Dean asked about the content of Krantz' speech. I have taken this into account in assessing Krantz' credibility.

then came into the salesroom, where other employees were then congregating. As soon as Ray came in, Bedwell told him to wait in Bedwell's office, "we want to talk to you . . . we'll be with you in a little while."[11] Ray waited in the office for 3 or 4 minutes (see *infra*, fn. 14), during which period Bedwell went in and out of his office several times; the last time he left his office, he left the door open between his office and a hallway to the salesroom. At this time, Supervisors Bedwell and Richardson, and employees Meeks and John Tomlin,[12] were in the salesroom trying to locate some misplaced invoices which Tomlin would ordinarily have carried with him on his route that day. Ray went up to the opened doorway to Bedwell's office and for 6 or 7 minutes observed this activity; while he was looking at it, he moved to or near the end of the hallway.[13] At or about 6:30 a.m., about 10 minutes after Ray clocked in, Dean came into the salesroom.[14]

When Dean saw Ray, Dean's face went red. He told Ray, "you get back in that office," followed Ray through the office door, and said, "you sit down right there in that chair and don't move." Ray said, "Why, Mr. Dean?" Dean replied, "because I said, that's why." Ray said that he did not have to sit down if he did not want to. Dean said, "well, maybe you don't have to sit down, but you better not leave this office until I'm ready to talk to you."[15] Then, Dean rushed back into the salesroom, slamming the office door behind him.[16] During this exchange, Ray spoke in his normal tone of voice, which is not particularly loud,[17] and Dean, whose normal tone of voice is about average, raised his voice somewhat.[18] Ray is much younger and somewhat bigger than Dean.[19]

A couple of minutes later, Ray decided that he wanted to use the restroom. He had seen Bedwell in the salesroom within earshot of Dean's instructions to Ray about staying in the office, so Ray decided to leave the office by another door which is not visible from the salesroom. On the way to the restroom he encountered Bedwell. Ray said that he was going to the restroom, and Bedwell turned away from Ray and went on.

After using the restroom, Ray decided to telephone Union Representative Williams, because Ray was scared by Dean's conduct, thought it was due to the mailgram advising Respondent of his union activity, and hoped Williams could help Ray. Accordingly, he started to walk toward the breakroom, which has the only public telephone in the building and can be reached only through the production area. Dean, who was still in the salesroom looking for the mislaid invoices, saw Ray as he was passing by one of the doors to the home packaging salesroom, and inferred that Ray's ultimate destination was the production area.[20] Dean said, "I thought I told you to stay in that office."

Ray said that he was ready to talk to Dean "right now" if Dean was ready to talk, but if not, Ray had to use the telephone. Dean said, "I don't care what you need to do, you stay in that office until I'm ready to talk to you." Ray said, "Mr. Dean, are you ready to talk to me right now?" Dean said no. Ray said "then, I need to use the phone."[21]

Ray then proceeded to the breakroom. First, he tried to telephone Williams at the union office, but that office does not open until 8 a.m. and there was no answer. Then, Ray tried to telephone his wife at her place of employment, but he did not know her extension, and, because it was not yet 7 a.m., he could reach only a security guard who had no internal telephone directory. Ray waited in the breakroom until a little after 7 a.m. He then reached his wife, described Dean's behavior, said that Ray thought Dean was trying to intimidate him, and told her to keep on telephoning Williams' number until she reached him, and to tell him what Ray had told her.

After the Dean-Ray conversation regarding the telephone, Dean called Personnel Director Jack Johnson to his office. Johnson did not testify. Dean testified that, during this conversation, he told Johnson that Dean had decided to discharge Ray. Then, about 5 minutes after the Dean-Ray conversation, Dean went to the door of the breakroom and looked at Ray through the window on that door.[22] Ray saw him there, but remained in the breakroom until he had reached his wife shortly after 7 a.m., and more than a half hour after Dean had first told him to stay in Bedwell's office. Then, Ray returned to Bedwell's office. Ray saw Dean in his office across the

[11] My finding that he was told to "wait" in Bedwell's office is based on Ray's and Dean's testimony. For demeanor reasons, I do not accept the testimony of advance salesman Howard Meeks that Bedwell told Ray to have a seat in the office. Also, in view of the 6:21 a.m. entry on Ray's timecard, I do not accept Meeks' testimony that Bedwell issued his instructions as late as 6:30 or 6:35.

[12] Also referred to in the record as Tomberlain, Tombelain, and Tomblain.

[13] My finding in this sentence is based on Dean's and Meeks' testimony. For demeanor reasons, I do not accept Ray's testimony that he remained in the doorway to Bedwell's office.

[14] My finding as to the time is based on Dean's testimony. I believe that Ray was mistaken in testifying that Dean did not come in until Ray had been waiting for 20 or 25 minutes—that is, until about 6:40 or 6:45.

[15] My findings in this paragraph up to this point are based on Ray's testimony. Dean and Meeks both testified that Dean said that he thought Bedwell had told Ray to stay in Bedwell's office until "we" had a chance to talk to him, Ray said that he would not stay in there, Dean started walking toward him, and then Ray backed into Bedwell's office. For demeanor reasons, I credit Ray.

[16] My finding that Dean slammed the door is based on Ray's testimony. For demeanor reasons, I do not accept Meeks' testimony that the door remained open, or Dean's testimony that he merely shut it in a normal fashion.

[17] In view of Ray's tone of voice during about 70 pages of testimony, I do not accept Dean's testimony that Ray's voice is normally "rather a strong voice for a young man." However, I accept Dean's testimony that Ray testified in a softer voice than he usually employs.

[18] This finding is based on Dean's testimony, which I believe to be more probable than Meeks' testimony that Dean did not raise his voice at all.

[19] Ray appeared to be about 25 years old, and Dean appeared to be about 60. Dean testified that he is 6 feet, 1-1/2 inches tall. Ray is a little taller and is somewhat more heavily built.

[20] At the point where Dean saw Ray, he could not have been heading for the restroom.

[21] My findings in this paragraph are based on a composite of credible portions of Ray's and Dean's testimony. Dean did not testimonially refer to Ray's statement that he would come to the office at once if Dean was ready to speak to him.

[22] This finding is based on Ray's testimony. For demeanor reasons, I do not accept Dean's testimony that he went up to Ray while he was trying to use the telephone, and told him that Dean was ready to see him, but he said he had to use the telephone first.

hall, assumed that Dean had seen Ray, and concluded that Dean still did not want to talk to him. After he had waited there for 5 or 10 minutes, Dean told him to come to Dean's office.[23]

When Ray entered Dean's office, he found Dean and Personnel Manager Jack Johnson. Dean told Ray to shut the door, and he did so. Ray started to sit down. Dean asked him to please remain standing. Ray said that he would rather sit, if Dean did not mind. Dean replied, "I said remain standing." By this time, Ray was already seated, and he did not get up because he felt Dean was going to fire him. After referring to the mailgram stating that Ray was a union organizer, Dean said, "I'm sure that Mr. Williams has advised you of your rights as an organizer . . . now, I'm going to advise you of my rights as an employer . . . you listen to a few things, [you have] to be at work on time [you have] to be at work every day [you have] to do [your] job satisfactory and, you have to obey orders and this morning you disobeyed a direct order, so, I'm discharging you for that reason." Dean further said that Ray had been on the telephone for more than 3 minutes and Respondent had a 3-minute limit.[24] Ray said that Dean was mistaken about how long Ray had been on the telephone, and Dean said he was not. It is undisputed that, prior to this interview, Ray had never received any complaints about his work.

As Ray got up to leave, Dean told him to clock out and not to come back. Johnson told Ray that he could come back the following week to bring back his uniforms. Dean followed him to the timeclock. After Ray had punched out, he said that he wanted to call his wife by means of the public pay telephone in the breakroom, which can be reached only through the production area. Dean told him to use Respondent's telephone in the cold drink salesroom, which is across the hall from the production area. After telephoning his wife to pick him up, Ray started out the employee entrance, which is a short distance from the cold bottle salesroom and right next to the production area. Dean told him not to use that door, which led into a yard where some employees were still working, but to use the front door, which is on the other side of the building from the production area and whose use at that hour required Dean to unlock two doors. Dean testified that he had let other employees out of that door after discharging them, and that he let Ray out that door because "I was going back to my office, and that I wanted to inform him how he should bring his uniforms back, and that it was nearest to my office, and that I didn't want him on the company property any longer." Dean told Ray that the receptionist would see to it that someone would take care of him when he brought in his uniforms, that Dean did not want any trouble, but "if trouble is what you want, trouble is what you'll get," and that if Ray came back on company property any more, except to bring back his uniforms, Dean would have him arrested. As Ray went out the door, Dean told him not to wait for his wife in Respondent's parking lot outside the door, but to wait across the street.

My findings as to the August 24 events are based on a composite of credible portions of the testimony of Ray, Dean, and Meeks. I have credited most of Ray's testimony, except for this testimony regarding time. Dean testified that he began the discharge interview by reading to Ray the statement, dictated to Dean by Krantz, that Ray would be disciplined unless he conformed with certain limitations, allegedly set by "Federal law," on distribution of union literature and solicitation of union cards. Because Dean testified that he had decided before beginning this interview that Ray would be discharged during the interview, reading Ray the Krantz memorandum would not have served any self-evidently useful purpose. During suggestive parts of a cross-examination by Respondent's counsel, Dean testified that he read Ray the Krantz memorandum in order to advise Ray why he had sat in the office to begin with. However, there is no evidence that Dean told Ray that this was why he was being told about limitations on his right to engage in union activity. I accept Ray's denial that Dean read him this memorandum. Meeks testified that after Ray's first return to Bedwell's office pursuant to Dean's instructions, but before Ray's discharge, Meeks saw Ray in the parking lot 100 or 150 yards from the employee entrance and walking toward that entrance. The record fails to show any reason why Ray would have wanted to be in this area at that time. I accept Ray's denial that he left the building during this period; but in any event, there is no evidence that this alleged incident was reported to management before Ray's discharge.

D. *Further Alleged Interference, Restraint, and Coercion; the Allegedly Disriminatory Discharge of David Lewis*

1. Alleged threat to employ Kelley

Ray was discharged on Friday, August 24. On Monday, August 27, as employee Kelley was preparing to leave on his route, Dean asked him to come to Dean's office. The two went to that office and Dean shut the door. Then, in statements sprinkled with obscenities, Dean said, "who in the hell do you think you are," called Kelley a backstabber and low-down, and asked him if he were ready to resign that morning. Kelley asked what for. Dean said that Kelley knew what Dean was talking about. Dean said that nobody "around here" liked Kelley. Kelley said that he did not believe that. Dean said that Kelley had a "bad attitude" and was a troublemaker. Kelley said that he was surprised that a company leader like Dean would talk like that to an employee. Dean said, "yeah, I bet you are." Kelley said that, if he were a different kind of person, he would probably be doing "something else" to Dean. Dean obscenely told him to go ahead. Kelley said that he would not lower himself to Dean's level. After some further conversation, Dean profanely told Kelley to leave, and

[23] My finding as to the length of his wait is based on his testimony that he did not reach his wife until a little after 7 a.m., the admitted brevity of his discharge interview, and the 7:17 clockout time on his timecard. For these and demeanor reasons, I do not accept either Ray's testimony that he waited for 15 minutes, or Dean's testimony that he called Ray into Dean's office immediately upon Ray's return to Bedwell's office.

[24] Dean testified that employees were permitted to make local telephone calls on the district managers' telephones, if such calls took no more than a "reasonable" time.

he did so. The Union was not mentioned during this conversation.[25]

2. Limitations on solicitation and on talking about the Union

At a union meeting on the following day, August 28, Union Representative Williams told the employees present that if they were fired, the only existing evidence of their union activity would be their signed union cards. He told them that if they wanted to create proof that Respondent knew about their union activity, they could sign a sheet stating that they were volunteer organizers, and then Williams would so advise Respondent in writing. Such a sheet was signed by employees Lewis, Kirby, Stillwell, and Kelley. Williams asked them not to carry on union organization on company time or property, because such activity "would just cause more problems" for the employees.[26] A mailgram from Williams, stating that these four employees were volunteer organizers, was delivered to Respondent by telephone at 2:45 p.m. on August 29, and thereafter delivered to Respondent in writing.

Thereafter, Dean called to his office individually each of the four employees named in the mailgram as a "volunteer organizer." Dean credibly testified that he read to each of these four employees, and to no others, substantially the same solicitation material prepared to be read to employee Ray (see *supra*, part II, C). Also, Dean told employee Kelley that he was not allowed to sign cards on company time, or on company property. Further, Dean told employee Kirby "that it was illegal, against the Federal law, to sign union cards, on company time, and on company property, or to solicit any union pamphlets or anything of that sort, on company time and property." In addition, Dean told employee Stillwell that he was not allowed to solicit union cards or talk about the Union on company time or company property. Moreover, Dean told employee Lewis that he would be discharged if he carried on union organizing in the company plant or on company time.[27] Dean testified that, before receiving the mailgram, he had never had any reason to call anyone in and read to them a statement of that nature, and had never in fact done so.

Respondent has at all times maintained on its bulletin board, beginning on a date before the union campaign began, a notice to employees which reads in part as follows:

> The following list includes types of offenses for which disciplinary action will be considered. *Those offenses where a check appears usually indicate the types of offenses where immediate termination may be considered depending on the circumstances.* . . .
>
> * * * * *
>
> *Other Problems—Outside Activities*
>
> Unauthorized soliciting
> Willful slowdown of production
> Wage garnishment
> Outside criminal activities
> Working for competing company

The bulletin lists a total of about 29 kinds of offenses.

Dean testified that Respondent has authorized and encouraged its employees to sign petitions against proposed legislation which would require a deposit on all soft-drink containers, and has instructed its employees to take such petitions to the dealers with the request that they solicit their customers to sign. Further, Dean testified that Respondent has instructed the people in its sales department to ask its dealers to put near their cash registers containers inviting contributions to a fund to combat cerebral palsy, and has further instructed Respondent's sales department people to pick up such cans and turn the money over to the designated fund. Also, Dean testified that the ban on "unauthorized soliciting" does not extend to soliciting of employees by the employer. He so characterized Respondent's solicitation of employees, before management's interviews with the "volunteer organizers," to contribute to the United Givers Fund. Dean further testified that Respondent had authorized solicitation of employees by employees for such purposes as contributions to funds for an employee whose home had burned and for flowers to be sent to an employee's funeral. The record further shows that from time to time employees posted notices on Respondent's bulletin board inviting other employees who wanted to participate in softball games or other athletics to register on the notices. Dean also testified that the rule regarding "Other Problems—Outside Activities . . . Unauthorized soliciting," does not extend to employees' nonwork time or breaktime. Management's interviews with the "volunteer organizers" aside, there is no evidence that this limitation has ever been conveyed to the employees. Dean went on to testify that, although he does not "condone" solicitations between employees who are traveling together between stops, Respondent could exercise only limited control over such activity. Dean further testified that before he was notified that Ray was a "volunteer organizer," Respondent's no-solicitation rule never specifically dealt with or mentioned unions. Dean testified that Respondent's solicitation policy is based on what Respondent feels is Respondent's best interest, Respondent does not feel that solicitation on behalf of the Union is in management's best interest, such solicitation was not approved

[25] My findings about this conversation are based on Kelley's testimony. For demeanor reasons, I do not accept Dean's testimony that no such conversation occurred.

Dean testified to an alleged conversation with Kelley in June or July, allegedly in the presence of District Manager Weiss and Sales Manager Bedwell, when Dean allegedly threatened Kelley with discharge if he failed to get along with other members of Respondent's staff. Weiss testified for Respondent, but was not asked about this matter. Bedwell did not testify. Kelley testified to an alleged conversation with Dean, before Kelley signed a union card, about Kelley's alleged failure to get along with others, but he gave a substantially different account of what was said, he did not testify to Bedwell's presence, and Kelley's testimony strongly suggests that Weiss was not there. I need not and do not determine what was said during the alleged conversation or conversations described in this paragraph.

[26] My finding in this sentence is based on a composite of credible parts of the testimony of Kirby, Stillwell, and Lewis.

[27] My findings in these four sentences are based on the employees' testimony. For demeanor reasons, I do not accept Dean's denials.

by Respondent, Respondent's policy "for years" has prohibited such activity, and management would oppose the distribution of prounion literature among its employees. No prounion literature was posted or distributed among employees in the plant during the union campaign. A good deal of antiunion literature was posted, but, so far as the record shows, all of it emanated from Respondent. On one occasion after Kirby's interview with Dean about solicitation, Kirby and three of Respondent's other employees stood across the street from Respondent's plant to distribute union literature, because Kirby was not sure whether the employees were allowed to do this on company property.[28]

E. *Further Alleged Interference, Restraint, and Coercion; the Discharge of David E. Lewis*

David E. Lewis started working for Respondent in September 1978. As previously noted, he was one of the employees who began the union campaign, signed a union card the day the campaign began, and induced 10 to 14 other employees to sign. He was one of those identified as a "volunteer organizer" on the August 29 mailgram which the Union sent to Respondent, and was one of the employees whom Dean called individually to his office to describe "Federal law's" alleged restrictions on union solicitation. Lewis was told during this interview that he would be discharged if he carried on union organizing in the company plant or on company time.

In performing his duties on his route as merchandiser, Lewis was required to visit specified retail stores which purchased soft drinks manufactured by Respondent. His duties gave him access to both the public and the stockroom areas of the store. About early August 1979, Respondent began to manufacture a new kind of soft drink called Mello Yello. One of the stores on Lewis' route was a supermarket called Store No. 8 of H. G. Hill Company. On Wednesday, September 5, when Lewis came into that store to perform his duties, he was wearing a Mello Yello button and T-shirt, which Respondent encouraged him to wear as often as possible. Two Hill employees, Luke McCollum and James (Steve) Smith, asked Lewis for some "samples" of Mello Yello. He said that, after he finished servicing the store, he would buy some, or try to get some from the salesman when he came in. At or about 11 a.m., while Lewis was in the backroom, an advance salesman for Respondent, Gerald Revlett, came in. Lewis asked whether he had any samples of Mello Yello. Revlett said no. Lewis asked whether Revlett would write up a six-pack for Lewis for samples.[29] When Revlett said that he could not do that, Lewis said that he would take the Mello Yello drinks up front and buy them.[30] Lewis thereupon took a six-pack of nonreturnable 10-ounce bottles of Mello Yello from a store shelf where customers were expected to obtain soft drinks they wished to purchase, and paid the regular retail price to one of Hill's cashiers, who gave him a receipt therefor. Then, using supplies from Hill's stockroom, Lewis filled three Styrofoam cups with ice. He opened two of the Mello Yello bottles in the six-pack he had paid for, filled the cups, gave one to McCollum and one to Smith, and drank the third cup himself. He removed the four remaining bottles from the carton they came in, and put them in what Lewis called "my reject case." This was a case which was physically stored on one of the racks where Hill kept soft drinks it had paid for, but which contained permanently unsalable bottles for which Hill had not paid and which Respondent's salesmen were supposed to pick up.[31] A few minutes later, Revlett asked Lewis whether he wanted Revlett to write up some Mello Yello drinks for him. Lewis said no, he had already bought some. Revlett said, "I didn't mean to snap at you . . . I would have wrote them up for you if you would have waited." Then, Lewis left the store.[32]

The following Friday morning, Lewis again came to service the Hill store. He was again wearing his Mello Yello T-shirt. A woman who was demonstrating a barbecue grill in the store told him that she had heard this was a pretty good drink but had not had a chance to try it, and asked if he had any samples. After Lewis had completed his duties at that store, he went into the back storage room, obtained a Styrofoam cup from McCollum, and took from his "reject case" on one of Hill's storage racks one of the remaining four bottles which Lewis had bought the preceding Wednesday.

As he was removing this bottle, he was approached from the back by Steven B. Moore, Hill's assistant manager. Lewis turned around, with the bottle in one hand and the cup in the other, and saw Moore.[33] Lewis greeted Moore, and, in Moore's presence, went over to Hill's icemaker, filled the cup with ice, left the back storage room, and (still in view of Moore) gave the bottle and the cup to the barbecue demonstrator. Then, Lewis left the store to continue on his route.

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[28] One of the participants in this activity was Lewis. Although this occurred after his discriminatory discharge, there is no evidence that his status affected the employees' decision about where to distribute literature.

[29] Lewis testified without contradiction that sometimes Revlett wrote up, as bad drinks, drinks which were not bad, and "I don't know what he does with them." Revlett in fact distributed free drinks of Mello Yello in Hill's storeroom to Hill employee McCollum and Hill's assistant store managers, Steven B. Moore and Ronnie Shoemaker.

[30] My findings as to the substance of this Revlett-Lewis conversation are based on a composite of Lewis' testimony and credible parts of Revlett's testimony. My findings as to the date are based on Lewis' testimony. For demeanor reasons, I do not accept Revlett's testimony in effect, that Lewis said nothing about buying the Mello Yello, or Revlett's testimony that this conversation occurred on a Friday morning which he was unable to identify and could have been Friday, September 7 (Lewis' last day of active employment), or any other Friday after Respondent's introduction of Mello Yello in early August. To this extent, I do not believe Revlett's testimony that he has never been in that store on Wednesday mornings.

[31] This "reject case" contained not only bottles which were permanently unsalable because they were broken or contaminated, but also unbroken bottles which Respondent's salesmen would not pick up, but which could not be sold until after Lewis washed dirt or broken glass from the outside. Lewis put his own bottles there, instead of in his truck, because he expected to return to the plant that day too late to have his merchandise checked in, and wanted to avoid confusion when his merchandise was checked out the following morning.

[32] My findings as to the Revlett-Lewis conversation are based on Lewis' testimony. For demeanor reasons, I do not accept Revlett's denial.

[33] My finding that he was holding a bottle is based on his testimony, which I credit for the reasons set forth *infra*.

Moore testified that the expression on Lewis' face when he saw Moore looking at him holding the Mello Yello led Moore to suspect that Lewis had taken it from Hill's stock without paying for it. Moore asked all of Hill's cashiers whether Lewis had paid for any Mello Yello that day, and all of them, accurately, said no.[34] Moore asked the barbecue demonstrator how she had obtained the Mello Yello, and she said, in effect, that Lewis had given it to her. Meanwhile, advance salesman Revlett, not claimed to be a supervisor, came into the store. Moore told Revlett that Hill had taken a bottle of soft drink and given it to a barbecue demonstrator, that it was a "pretty serious problem," and that Moore wanted something done about it.[35] Revlett said that he would take care of it. Then, Revlett attempted to reach Lewis' immediate supervisor, District Manager Fann, by telephone. Respondent's dispatcher, who answered the telephone, told Revlett that none of the district managers was in. Then Revlett spoke to Supervisor Bedwell. The record fails to show how much Revlett told Bedwell, but Bedwell said that he had another engagement and referred the call to Dean with the comment that it involved a "serious complaint" from Hill. It is unclear from the record what portions of Moore's complaint were then relayed to Dean, but Revlett told Dean that the complaint involved Lewis, and Revlett testified that he "guessed" he was the one who brought up Lewis' name.[36] Dean testified that all three district managers were in the field, that he arranged to have them given one page through paging devices which they carry with them, but that none of them responded. Then, Dean and Personnel Manager Jack Johnson went out to Hill's.

During the Lewis incident, the manager of Hill's store, Bill Piper, had been out to lunch. He returned from lunch after Revlett had left the store, whereupon Assistant Store Manager Moore told Piper that Lewis had taken a Mello Yello drink without paying for it, Moore had told Revlett what had happened, Revlett said he would take care of it, and thereafter Revlett called someone on the telephone. A little later, Dean and Jack Johnson came to the store, approached Piper, and asked to speak to Moore about the Lewis incident. Piper thereupon summoned Moore and introduced Dean and Johnson.[37] Then, within earshot of Piper, Dean and Johnson interviewed Moore. Moore told Dean and Johnson that Moore had seen Lewis giving a bottle (see *infra*) of Mello Yello to a barbecue demonstrator, and that Moore had checked with Hill's checkers, all of whom had told him that Lewis had not paid for any Mello Yello.[38] Dean asked Moore if it would be sufficient that Lewis not be in the store any longer, and Moore said that would be fine with him.[39] Then, Johnson prepared a written statement. Before Dean and Johnson left the store, they asked Store Manager Piper to review the document and make sure that it was satisfactory. Dean testified that Piper, who had no personal knowledge whatever about the Lewis incident, read the statement and then said that "to the best of his ability, that's the way it happened." Dean and Moore both testimonially identified this statement, which was not shown to Piper when he testified on Respondent's behalf, as Respondent's Exhibit 5, a two-page document. The first page contains an entry (in the upper right-hand corner and above the date) "Page 1 of 2," consists of two complete paragraphs, and bears Moore's complete signature on a line in the lower right-hand corner. The second page, also bearing Moore's complete signature, bears the entry in the upper right-hand corner "Page 2 of 2," and states in its entirety, "Mr. Moore made a firm statement that his company (H. G. Hills) [sic] did not want Mr. David Lewis in *any* of the H. G. Hill stores again." Moore and Dean, the only witnesses who testified about Moore's written statement, testified that Moore signed the document before Piper read it. The examination and responses in this respect did not differentiate between Moore's two signatures. Piper, whom Respondent called as a witness, was not asked about this matter, and Johnson did not testify. Dean has known Piper for many years, and Johnson has known him for quite a while.

Dean testified that Moore said his efforts to determine whether Lewis had paid for the Mello Yello included a conversation with the backdoor checker. Moore did not testify to having such a conversation or telling Dean and Johnson about it. The backdoor checker was usually McCollum, to whom Lewis had given some Mello Yello from Lewis' six-pack the preceding Wednesday, and who might have alerted Moore to Lewis' earlier purchase if Moore had talked to McCollum. I do not accept Dean's wholly uncorroborated testimony about Moore's alleged statement regarding the back-door checker. Dean further testified that Moore said he had seen Lewis remove a Mello Yello drink from a case on a rack. Moore denied seeing Lewis do this, and I do not accept Dean's uncorroborated testimony that Moore made such a report to Dean and Johnson. Also, Dean testified that Moore reported that after removing this drink, Lewis had set another "case," which was full, on top; and Respondent's Exhibit 5 so states. On direct examination, Moore did not refer to this alleged action by Lewis, but stated, "as I approached him . . . he turned around . . . and when he turned around, he had a Mello Yello [drink] in one hand,

[34] Lewis had purchased about $1.44 worth of other merchandise from the store on that day. A six-pack of nonreturnable 10-ounce Mello Yello bottles cost about $1.79.

[35] My finding that Moore identified the container as a bottle is based on Revlett's testimony and other evidence summarized *infra*.

[36] Dean testified that he could not recall whether he asked who was involved.

[37] My finding that it was Piper with whom Dean and Johnson made their first contact is based on Piper's and Moore's testimony. For demeanor reasons, I do not accept Dean's testimony that he asked the head checker for Moore, whereupon she paged him.

[38] My finding in this sentence is based on credible portions of Dean's testimony about this conversation. For the reasons summarized *infra*, I do not accept other portions of his testimony about this conversation.

[39] This finding is based on the testimony of Moore, who further testified that when a nonemployee removes store property from the store, "the most we usually do is to tell them . . . never to come back in [the store] again." Lewis credibly testified that, during his discharge interview, Dean told him in Personnel Manager Johnson's presence that one of the store managers did not want Lewis back "in the store." For demeanor reasons, I do not accept Dean's testimony that Moore concluded his account of the incident by saying that he did not want Lewis in any of Hill's stores any more (Dean's version on direct examination as the General Counsel's witness) or that Moore did not want to have Lewis service "his" store (Dean's version on cross-examination by Respondent's counsel).

and a styrofoam cup in the other . . . I walked over to the rack . . . and noticed that there was a case of Mello Yello's where he was at, and inside the case, there was one Mello Yello missing . . . and I thought that was peculiar." On cross-examination, Moore testified that when he first saw Lewis in the stockroom, Lewis was not holding the Mello Yello or the cup; that Moore saw him move "two cases" or "about two cases" of Coke on top of "the Mello Yello" case; and that thereafter Lewis picked up the Mellow Yello and the cup and turned around. Moore further testified on cross-examination that it was "not unusual" for individual soft drink containers to be missing from racks in the stockroom,[40] and that the drink was missing from a portion of the case where its absence could be seen by the backdoor checker or others only if no cases or other cartons were on top of it. I do not credit Moore's testimony on cross-examination that, before Lewis turned around, Moore saw him put two or about two cases of Coke on a case from the center of which a Mello Yello drink was missing. I do believe that, when Moore got in touch with Respondent, he really did suspect that Lewis may have taken a Mello Yello drink from Hill's stock without paying for it. I need not and do not determine whether the allegation in Respondent's Exhibit 5 about the Coke "case" initially proceeded from Moore or from Dean and Johnson.

Lewis testified that the six-pack he purchased on September 5 consisted of bottles, and that the Mello Yello he gave to the barbecue demonstrator on September 7 consisted of one of these bottles. The written statement signed by Moore states that he saw Lewis with a bottle of Mello Yello. Moore testified that, when reading the statement before signing it, he told Johnson and Dean that Lewis had had a can, and "they said that wouldn't make too much difference." Johnson did not testify, and Dean did not corroborate Moore's testimony regarding Moore's alleged tender of a correction. Dean initially testified that Moore said Lewis took a can of Mello Yello, but Dean later testified that Moore said he had observed Lewis "taking a can—or bottle." Thereafter, Dean testified as follows:

> JUDGE SHERMAN: Was this a can or a bottle?
>
> THE WITNESS: It seems like it is the can; sometimes there was a question as to whether it was a can or a bottle; but when Mr. Moore testified in the Middle Tennessee District Court, Your Honor, ma'm, I recall that he said that it was a can.
>
> JUDGE SHERMAN: Well, did he tell you?
>
> THE WITNESS: At the time, we understood that it was a bottle.

Revlett initially testified that he believed, although he was not sure, that Moore described the drink allegedly taken by Lewis as a bottle; later, Revlett testified that Moore said Lewis "took the bottle off—a bottle—can, whatever it was." I find that Lewis was holding a bottle, and discredit Moore's testimony that Lewis was holding a can and Moore so reported to Dean and Johnson.

The foregoing events occurred on Friday, September 7. On Monday, September 10, Lewis reported to work at the facility at his usual hour, and, as usual, went into the home package salesroom where the employees congregated before going out on their routes.

At an undisclosed hour that morning, Dean told Bedwell that Dean would like to see Lewis "before he left."[41] While Lewis was waiting in the salesroom, Bedwell looked at Lewis' load sheets and asked him to wait around for a minute because he might need some help on his route. At this time, two other employees, both new, were still in the home package delivery room. Bedwell told one of them to go to the truck gate, and the other to wait in the cafeteria until Bedwell came and got him (see *infra*, fn. 42, and attached text). After Lewis had waited alone in the room for 10 or 15 minutes, Dean came by and said that he would see Lewis in a few minutes. A little later, Bedwell came in. Lewis asked whether he could go upstairs to get a Coke. Bedwell said, "[S]ure, but come right back." While on this errand, Lewis saw in the cafeteria one of the two employees whom Bedwell had directed to leave the home package salesroom. Lewis asked this employee what he was doing there, and he replied that Bedwell had told him to wait up there until Bedwell came and got him.[42] After getting his Coke, Lewis returned to the waiting room and telephoned his wife from a telephone in Bedwell's office. While Lewis was on the telephone, he was summoned to Dean's office. Lewis and Bedwell thereupon went into Dean's office, where Dean was sitting with Personnel Manager Johnson. At Dean's request, Bedwell left.

Dean then told Lewis that one of his store managers had called in a complaint against Lewis of very serious misconduct, and that Respondent was going to have to terminate him, because the manager did not want him back in the store any more. Lewis asked what he had allegedly done. Dean said that he felt as if Lewis knew what he had done. Lewis asked which store it was. Dean said that Lewis ought to know which store it was. After a short pause, Lewis said that he was not sure, and again asked what store it was. Dean again said that Lewis ought to know which one it was. Lewis said, "[Y]ou mean you're not going to tell me which one it was?" Dean said, "[N]o . . . you know which one it was." Dean further said that he did not want Lewis on company property any more, except to turn in his uniforms and pick up his last check. Then, Dean followed Lewis to

[40] Merchandiser Kirby, who had worked for Respondent for almost 2 years, credibly testified that he "daily" observed six-packs from store stockrooms, or from Respondent's truck, with a missing can or bottle, "something is missing all the time." Merchandiser Stillwell, who had worked for Respondent for a year and a half, credibly testified that "all the time" such individual drinks were missing from six-packs off the truck. When cases of soft drinks are checked by a store representative, the cases are stacked on top of each other, and the checker is able to detect a missing drink only if it is missing from the top or front edge of the stack.

[41] The quotation is from Dean's testimony.

[42] This finding is based on Lewis' uncontradicted and credible testimony. Because such testimony was received without objection, I accept it as probative of what the employee was told by Bedwell, who did not testify. *American Rubber Products Corp.* v. *N.L.R.B.*, 214 F.2d 47, 52 (7th Cir. 1954).

the timeclock, Lewis clocked out and gave his timecard to Dean, and Dean let him out the front door.[43] On September 12, 2 days later, advance salesman Revlett told store manager Piper, "[W]ell, your boy is gone."

After being discharged, Lewis told his wife, and then went to the office of Union Representative Williams, who on September 26 filed an amended charge herein alleging, *inter alia*, that Lewis had been discharged for union activity. On an undisclosed date between his September 10 discharge and a September 13 conversation with Hill Store Manager Piper (see *infra*), Lewis telephoned the "Bordeaux" store, where there had been a "mix-up" on September 7, and asked whether management at that store had complained to Respondent about Lewis. He received a negative reply. About September 13, Lewis was told by an employee who was still in Respondent's employ that he had heard Lewis' discharge had "something to do with [Lewis] was taking drinks out of H. G. Hill's [store No. 8] in Green Hills." That same or the next day, Lewis went out to that store and approached Store Manager Piper. Professing ignorance of Lewis' discharge (see *infra*, fn. 4), Piper asked, "[A]re you off today?" Lewis said that he had been fired. Piper asked why. Lewis said, "[T]hat's what I'm here for, I'm trying to find out." Lewis went on to say that he had heard a rumor that someone from Piper's store had "called in" on Lewis, asked whether anyone from Hill had called Respondent about Lewis' consumption and distribution of soft drinks at Hill, and told Piper that Lewis had paid for those soft drinks. Lewis further asked whether Piper had complained to Respondent that Lewis sometimes failed to fill the store's Coke machine. Piper said that he was not aware that anyone had "called in on" Lewis, and that Piper did not know why anyone would. Piper went on to say that Lewis had been one of the best merchandisers that had been in the store in a while, but I find that this compliment was insincere.[44] Hill later told Respondent that Hill was "very upset" about this visit by Lewis. Lewis could not think of any more stores that he may have "messed up in," and he did not ask any other stores about the matter. Dean was unable to recall any complaints from customers about Lewis' work before Hill's September 7 complaint to Respondent.

Thereafter, Lewis applied for unemployment compensation. Respondent opposed his claim, and on October 23 a hearing was held thereon at which Respondent was represented by Personnel Manager Jack Johnson. Johnson stated to the referee that Assistant Store Manager Moore had "called in on" Lewis for removing property from Hill. Lewis' wife, who attended the hearing, asked, "[A]re you saying he stole?" Johnson said, "[N]o, we're not saying, stealing . . . we'd rather not say that . . . we'd rather just say it this other way." Also, Johnson produced the statement signed by Moore and received in the instant proceeding as Respondent's Exhibit 5. Then, Lewis told the referee that Lewis had not been told why he was fired, or what he had done, or when he had done it. The referee asked Johnson why Lewis had not been told the reason for his discharge when he was fired, so that he could explain. Johnson said that "it wasn't important at the time." The referee asked Johnson when he thought it was going to be important. Johnson did not reply. Lewis said, in effect, that he thought he had been discharged for union activity. Johnson denied this. The referee said, "[W]ell . . . we'll just leave the union out of this," and asked Lewis what had happened. The referee eventually upheld Lewis' right to unemployment compensation.

On the same day as and immediately after the unemployment compensation hearing, Lewis again went to see Store Manager Piper. Lewis asked whether he had read or seen Moore's statement against Lewis. Piper untruthfully said no. Lewis said that he had just heard at an unemployment compensation hearing that Piper had read and agreed to the statement. Piper untruthfully said he had read nothing, and said he was not going to get involved. Piper said that the matter was between Lewis, Moore, and Dean, and that all Piper knew or wanted to know was that he saw Dean talking to Moore.

After talking to Piper, Lewis came to Hill on several occasions in an effort to see Moore. On each such occasion, Lewis was advised that Moore was out to lunch or off that day. Lewis never did talk to Moore about the matter. Moore testified that on September 7 he asked the store checkers and the barbecue demonstrator about the Mello Yello because "I wanted to find out whether or not there was enough information that I should ask [Lewis] without destroying his upstanding as a man who services our store," and that Moore was concerned about Lewis' reputation. Moore went on to testify that by the time he had finished questioning the checkers and the barbecue demonstrator, Lewis had left the store; that Moore never asked Lewis whether he paid or had a receipt for the Mello Yello; and that so far as Moore knew, neither did any official of Respondent or of Hill put such questions to Lewis. Hill Store Manager Piper testified that if a salesman not in Hill's employ removes any property from the store, the store does not allow that salesman back in the store any more, without regard to the value of the property involved. Moore testified that before he talked about the Lewis matter to Dean, Moore did not discuss with Piper about what action the store was going to take against Lewis. Dean testified that he did not hear until after Lewis' discharge about Hill's policies with regard to taking product. Moore credibly testified that the matter of Lewis' continued access to the store first came up when Dean asked Moore whether

[43] My findings as to the content of Lewis' termination interview are based on a composite of his testimony and credible portions of Dean's testimony. Johnson did not testify. For demeanor reasons, I do not accept Dean's testimony that Lewis said nothing about not knowing what he was terminated for.

[44] My finding that Piper in fact paid this compliment to Lewis is based on Lewis' testimony. For demeanor reasons, I do not credit Piper's denial that he made this remark. Piper impressed me as the kind of man who tries to avoid confrontations with anyone, and I believe that he complimented Lewis' work in order to appease him and to persuade him that his inquiries at that store were misdirected. On the other hand, I do not credit Piper's testimony that for 6 or 8 months before Lewis' discharge, Lewis would "run all over the store," eat all the samples, and talk to Hill's employees, instead of doing his job. Piper admittedly never mentioned these alleged derelictions to Respondent before Lewis' discharge, and Dean did not corroborate Piper's testimony that thereafter he told Dean that Lewis "wasn't worth a damn."

"you all" wanted Lewis back in the store. Dean testified that, if Respondent had concluded, as a result of its investigation, that Hill's allegation against Lewis was not true, Respondent would not have discharged him. Dean further testified that when he and Personnel Manager Johnson talked to Lewis, they did not ask him whether he had a receipt for the Mello Yello; so far as Dean knew, no other management personnel for Respondent ever asked Lewis about a receipt; and, so far as Dean knew, none of Hill's officials said anything to Lewis at the store before Hill's complaint was reported to Dean. When asked by the General Counsel why Respondent did not want to reveal to Lewis during his discharge interview the name of the customer who had a complaint, Dean testified:

> [W]e have to be very careful in this time and day, as to what we say and what we do, and . . . I felt like it was in the best interests of the Company, at that particular time, not to inform Mr. Lewis of who the dealer was; and, that is the reason that I did not do that, because I didn't feel like that should put this dealer in such a position, to where, if David Lewis should elect to go out and discuss this with him, or whatever actions that he might take, that he should be in that position at that particular time.
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> * * * * *
>
> [I]n this day and time . . . we didn't feel like it would be the right thing to tell David Lewis who the dealer was for whatever reason it might be, that if he wanted to go out there and discuss it or what other reasons—or other motives that he might have for going out there.

When Respondent's counsel asked Dean to explain whether in the foregoing testimony he was talking about union activity or about other types of possible liability, Dean replied:

> No, I was not talking about union activities; I was talking about someone taking property that belongs to a dealer of ours, or anyone else, with someone wearing the Coca Cola uniform out there that has our trademark on it, that you have to be very careful, and that I just felt that it would not be appropriate, or it would not be good business to identify the dealer at that particular time.[45]

Later, Dean testified that any businessmen are concerned "when they get any adverse publicity that would affect their business in any way," and that Dean had not given Lewis the name of the complaining dealer because, if the dealer were willing to let one of the two assistant store managers sign a statement, it was to Respondent's "interest not, at that particular time, to tell [Lewis] who the dealer was."

The first occasion on which anyone ever asked Lewis whether he had a receipt for the Mello Yello he bought on September 5 was his interview with Regional Office representatives during the investigation of the amended charge filed 16 days after his September 10 discharge. This interview may have taken place after the October 23 unemployment compensation hearing, some 6 weeks after the discharge. By the time of this interview, he had lost or mislaid the grocery receipt, for about $1.79.[46] The first occasion on which any representative of Respondent asked Lewis about a receipt was about the first week in November, about 2 months after his discharge, when Respondent's attorneys asked him about the matter during pretrial proceedings in connection with the Section 10(j) proceeding brought in district court in connection with this matter.

Except as specifically indicated, the foregoing findings in connection with Lewis are based on undisputed evidence. Respondent's cross-examination of Lewis revealed that he has a poor memory for dates and sequences of events and tends to confuse different but similar events, and that, at least arguably, he was neither imaginative nor persistent in his efforts after his discharge to find out the complaining dealer's identity and Lewis' alleged dereliction, both of which Respondent and Hill had deliberately withheld from him. Lewis' alleged difficulties in this respect may well have been compounded by the fact that, so far as the record shows, no customers had ever previously complained about him. In any event, any such deficiencies in Lewis' testimony have no bearing on the *bona fides* of Respondent's investigation as to whether he took the Mello Yello without paying for it, and do not impugn his undisputed and credible testimony that he paid for it.

F. *Respondent's Alleged Misrepresentation Regarding Use of Documents Signed by Employees at the Union's Behest*

About September 17, Respondent posted a letter, signed by Company President Johnson, which stated, *inter alia*:

> [U]nion organizers can paint a pretty picture but, once employees know the facts they reject unionism.
>
> Everything we have told you is factual; we will not lie to you or attempt to deceive you during this campaign or at any time during your employment at Wometco. Turner Williams and his crowd has lied and deceived Wometco employees in the past and he/they will do it again. Don't you believe the half-truth and promises of organizers—
>
> REJECT THEIR CARDS—REJECT THEM.

[45] Respondent's counsel thereupon brought out the pendency of a lawsuit against Respondent by a customer who was trying to hold Respondent answerable for changes allegedly made by one of Respondent's route salesmen in the number of cases on the sales ticket. When purchased from a vending machine, the Mello Yello allegedly taken from Hill by Lewis had a retail value of 35 cents.

[46] Lewis credibly testified that on September 5, his only purchase at Hill was the six-pack of Mello Yello. Assistant Store Manager Moore testified that the then retail price was about $1.79.

Concurrently with this notice, Respondent also posted on its bulletin boards copies of a notice which stated as follows:

> BE CAREFUL OF WHAT YOU SIGN!
>
> RETAIL CLERKS UNION LOCAL 1557 HAS FORGED EMPLOYEES SIGNATURES ONTO DOCUMENTS IN THE PAST!
>
> THEY MAY TRY TO DO IT AGAIN!
>
> TURNER WILLIAMS OR ONE OF HIS AGENTS WILL ASK YOU TO SIGN A PAPER "JUST TO SHOW YOU ATTENDED THE MEETING."
>
> AFTERWARDS THEY WILL FORGE YOUR NAME TO A LIST WHICH SAYS "WE THE UNDERSIGNED ARE GOING TO VOTE YES FOR THE UNION."
>
> THEY WILL THEN RELEASE THAT LIST TO EVERYBODY AND ATTEMPT TO BLACKMAIL YOU BY RELEASING YOUR NAMES.
>
> THEY'VE DONE IT BEFORE!
>
> DON'T LET THEM DO IT TO YOU!

Wometco Vice President Krantz testified that it was he who prepared the latter notice, and that it was based entirely on a May 1975 Report on Objections issued by the Acting Regional Director for Region 26 recommending the certification of the results of a March 1975 election which the Union lost in a unit of employees who worked for one of Respondent's sister corporations, Wometco Vending of Tennessee, Inc.[47] This report discloses that at a union meeting, the Union made available for signature both an attendance sheet and a letter urging fellow employees to vote for the Union. Still according to the report, after employees had signed the letter, the Union made photostatic copies of that letter, persuaded employees to sign such copies, cut out the original signatures from the photostatic copies, pasted such signatures on the original letter under the signatures of those who had signed it at the meeting, took a photostatic copy of the original letter with the first-collected and the pasted-on signatures, and then mailed this photostatic copy to the employees on the eligibility list.[48]

G. *Analysis and Conclusions*

1. Alleged interference, restraint, and coercion, other than the alleged forced isolation

I agree with the General Counsel that Respondent violated Section 8(a)(1) of the Act when Company President Johnson told the employees in his August 23 speech that, if employees were caught signing a union card or got the union in, they might lose their benefits or pensions, suffer a pay cut, or lose their jobs; and the plant might close if it were organized. Also, I agree with the General Counsel that Respondent further violated Section 8(a)(1) when Company Vice President Dean called employee Kelley a backstabber, low-down, and a troublemaker; further said that he had a bad attitude and that nobody "around here" liked him; and asked whether he was ready to resign that morning. I am satisfied that Dean was thereby threatening to discharge Kelley for union activity. Although the word "union" was not mentioned during this conversation, Dean had already reported the union movement to Company President Johnson, in Dean's presence Johnson had already revealed awareness that some employees were soliciting union cards and threatened to discharge or inflict other reprisals on employees for union activity, Dean had already discharged employee Ray because of his union activity (in much of which Kelley had also engaged), Dean did not in terms deny knowledge of such activity by Kelley as of the time this conversation took place,[49] and the record contains no other reasonable explanation for the ire which Dean displayed during this conversation.[50]

I also agree with the General Counsel that Respondent violated Section 8(a)(1) by posting the notice written by Krantz regarding the possible consequences of signing any document for the Union. Respondent had good reason to believe that employees would be reluctant to support a union which engaged in unlawful or unethical conduct.[51] Moreover, particularly in view of Respondent's threats to discharge employees for union activity, Respondent had good reason to believe that employees might feel reluctant to be publicly identified as union supporters.[52] However, Respondent posted on its bulletin boards notices which stated that employees who signed any kind of document for the Union ran the risk of being publicly identified with the Union, and supported this assertion with the allegation, specifically found untrue in the objections decision on which the notice's author (Krantz) allegedly based the notice, that the Union had previously engaged in forgery by transferring employees' signatures from an attendance list to a publicly released announcement of union support. Further, the notice went on to say that the Union had engaged and would engage in "blackmail" by releasing the names on documents signed at the Union's request. Even standing

[47] Apparently, no exceptions to this report were filed.

[48] The Report on Objections set forth these circumstances in discussing Wometco Vending's allegedly objectionable conduct in allegedly asking an employee whether she had signed the letter. The Acting Regional Director found that this alleged interrogation did not warrant setting the election aside because of, *inter alia*, Wometco Vending's reasonable basis for doubting the authenticity of the document in view of the fact that it appeared on its face not to be all one sheet of paper.

[49] Dean testified, "I got knowledge of [Kelley's involvement in union activities] about the time, I reckon, we got the Mailgram from the Retail Clerks" on the following day, August 25.

[50] Dean testified to a conversation with Kelley a month or more before the union movement began, during which Dean in effect threatened to discharge Kelley unless he started getting along better with other people. However, Dean testified that, after this conversation, Kelley's attitude "changed some," and Dean had no more problems with Kelley to "amount to anything" except for Kelley's failure in February 1980, 5 months after the conversation described in the text, to return to the plant by 5 p.m.

[51] Thus, such conduct by the Teamsters had led Respondent's employees to seek representation by a different union.

[52] Indeed, Krantz testified that after the Union made public in 1975 the compiled prounion letter which formed the basis for Krantz' 1979 notice, two or three employee signatories, one with tears in his eyes, came to Krantz and claimed they had not signed it, whereupon they were assured that there would be "no retaliation." As previously noted, the Regional Director found that these employees really had signed the original letter or a photocopy thereof.

alone, the term "blackmail" evokes the possibility of reprisals by Respondent against such employees; and Krantz' testimony shows that this was exactly what the notice was intended to suggest.[53] Concomitantly, Respondent maintained on its bulletin boards a notice that the Union had "lied and deceived" employees in the past and would do so again, and urging employees to reject the Union's cards. I conclude that Respondent violated Section 8(a)(1) by thus advising the employees that signing any document for the Union might cause the Union to repeat alleged prior unethical or illegal conduct which would expose the employees to misidentification and, hence, reprisals as union supporters. *Elm Hill Meats of Owensboro, Inc.*, 205 NLRB 285, 287 (1973); *Montgomery Ward & Co.*, 234 NLRB 13, 43, 53 (1978).

Section 13(a) of the complaint alleges that Respondent violated Section 8(a)(1) when Dean told an "employee" that employees who signed union cards on company property or on company time would be terminated. Employees Kelley and Kirby credibly testified that Dean forbade them to engage in such activity. I find that such statements violated Section 8(a)(1).[54] Respondent could not lawfully forbid employees, without restriction as to time, to sign union cards on company property. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962), cited with apparent approval, *Beth Israel Hospital* v. *N.L.R.B.*, 437 U.S. 483, 493, fn. 10 (1978). Nor could Respondent lawfully forbid its employees to execute union cards "on company time"; for such language fails to make clear to employees that, even when on the clock, they are free to execute union cards during breaktime or other periods when they are not expected to be actively working. *Birmingham Ornamental Iron Co.*, 240 NLRB 974 (ALJD part III,B,1, (2) (1979),[55] enfd. 615 F.2d 661 (5th Cir. 1980); *Florida Steel Corporation*, 215 NLRB 97, 98–99 (1974), enfd. in relevant part 529 F.2d 1225 (5th Cir. 1976). The force of this reasoning is unaffected by Union Representative Williams' advice to the employees not to carry on union organization on company time or property. Williams had neither the power nor a motive to discipline employees for disregarding his advice, which he ascribed to a desire to avoid causing the employees "more problems."

Section 13(b) of the complaint alleges that Respondent further violated Section 8(a)(1) when Dean called an "employee" to the office and warned him that he could not solicit union cards or make efforts at organization "while on the clock." The credible testimony shows that Dean called employees Stillwell and Lewis to Dean's office individually, told Stillwell that he was not allowed to solicit union cards or talk about the Union on company time or company property, and told Lewis that he would be discharged if he carried on union organizing in the company plant or on company time. I conclude that Dean's statements to Stillwell and Lewis violated Section 8(a)(1) for the reasons stated in connection with Kelley and Kirby, and for the further reason that Respondent admittedly permits employees to engage in any other kind of solicitation during breaks and during nonwork time, has authorized employees to engage in solicitation for other employees afflicted by death or other disaster, exercises little control over solicitations between employees in the field, bases its solicitation policy on what Respondent feels is Respondent's best interest, and does not feel that solicitation on behalf of the Union is in management's best interest. *Sunnyland Packing Co.*, 227 NLRB 590, 596 (1976), enfd. 557 F.2d 1157 (5th Cir. 1977); *Lance, Inc.*, 241 NLRB 655 (1979); *Jefferson Apparel Co.*, 248 NLRB 555 (fn. 3, ALJD part III,B,1) (1980).[56] Also, I agree with the General Counsel that these four interviews were unlawful for the additional reason that Respondent singled out these known union supporters to be called privately into the office of Respondent's second-ranking officer in order to be lectured about the supposed limitations on their Section 7 rights. *Carolina Steel Corp.*, 225 NLRB 20, 22–23 (1976); *Durango Boot, a Division of U.S. Industries, Inc.*, 247 NLRB 361 (1980); *Permanent Labor Corp.*, 248 NLRB 118, fn. 12 (1980); *Greenfield Manufacturing Co.*, 199 NLRB 756 (1972). Respondent's selective treatment of all such employees was rendered yet more coercive by the statements made to them which were alleged and found to constitute independent violations of Section 8(a)(1), and by Dean's inaccurate assertions that certain described restrictions on solicitation of union cards and distribution of union literature were imposed by "law" or by "Federal Law" rather than by Respondent. *Starkville, Inc.*, 219 NLRB 595, 596, 600–601 (1975).[57]

However, the complaint does not allege that Respondent violated the Act by means of the written prohibition against "unauthorized soliciting," or by the contents of the written statement, initially prepared to be read to Ray and later read to the other four "volunteer organizers," to the extent that it dealt with distribution of union

[53] Krantz testified that when Wometco Vending's employees advised management (falsely) that they had not signed the letter, management told them that the Union was trying "to blackmail the employees into voting, yes," and then told them that the signers had nothing to fear from Wometco Vending. Respondent's notice contained no such assurances against employer reprisals.

[54] I regard as inconsequential the variation in this connection between the pleading and the proof. Because the complaint does not allege any invalid prohibitions in connection with the distribution of union literature, I need not and do not consider the legality of the limitations thereon described to employee Kirby.

[55] I do not read this Decision as presumptively permitting a ban on solicitation in work areas.

[56] I need not and do not determine the significance, if any, of Respondent's action in itself posting antiunion literature (including literature which independently violated Section 8(a)(1); see *supra*), in participating in charitable solicitations of its employees and of its dealers' customers, and in encouraging solicitation against bottle-deposit legislation. Cf. *N.L.R.B.* v. *United Steelworkers of America (Nutone)*, 357 U.S. 357 (1958); *Rochester General Hospital*, 234 NLRB 253, 259 (1978). Moreover, because Respondent's prohibition against "unauthorized solicitation" was posted before the union campaign began, I reject the General Counsel's contention that Respondent's no-solicitation rule was unlawful because established for the first time at the very birth of union activity. Although pointing to several employees' credible denial that they knew about Respondent's no-solicitation rule, the General Counsel does not appear to attach significance to Respondent's failure to specifically draw it to the employees' attention, a circumstance to which I principally attribute the employees' ignorance.

[57] Sec. 11 of the complaint alleges that Dean summoned "an organizing committee member . . . to attend special, exclusive meetings to lecture him about company rules and penalties for violation." I regard this section as fairly descriptive of the meetings with all four "volunteer organizers," and regard as inconsequential the variation between the pleading and the proof.

literature and solicitation of union cards. Also, my findings as to the content of Krantz' August 23 speech call for dismissal of Section 9 of the complaint, which alleges that he threatened discharge and plant closure for union activity.

Finally, contrary to the General Counsel, I find that the record fails preponderantly to show that, on August 22, Respondent engaged in surveillance over employee Ray. The General Counsel points out that on that date Ray encountered supervisors on his route much more frequently than ever before; moreover, although other drivers had had such encounters more frequently than Ray, there is no evidence that these drivers ever encountered supervisors on three occasions in one day. The General Counsel further argues, in effect, that because Dean admittedly learned on August 19 or 20 about the union activity from some of the employees, because Company President Johnson and the Miami-based Wometco Vice President Krantz learned about the union movement early enough to enable them to deliver on August 23 the early morning antiunion speeches referring to organizing activity by employees, and because Ray was the employee most active in the union movement, Fann and Weiss must have known by August 22 about Ray's union activity; and that these supervisors' testimonial efforts at concealment of such alleged knowledge by August 22 support the inference that their encounters with Ray on that date were motivated by Ray's union activity. Cf. *Shattuck Denn Mining Corporation* v. *N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). Particularly in view of top management's antiunion speeches on the morning of August 23, I find improbable, and do not credit, Weiss' testimony that he did not find out about the union campaign until the afternoon of August 23. Also, I find improbable, and do not credit, Fann's uncorroborated denial that Dean told him before August 23 about the union campaign. However, because Ray's union activity did not involve direct contacts with a large number of employees, and because Fann and Weiss both gave plausible explanations for their presence at the locations where they encountered Ray on August 22, I do not think that the relative frequency of such encounters plus Fann's and Weiss' untruthful disclaimers of August 22 knowledge regarding the existence of a union campaign preponderantly establish that such encounters were motivated by Ray's active role in that campaign.[58] Unlike the General Counsel, I do not regard Fann's explanations for these August 22 encounters as rendered implausible by his inability to recall when or where he had seen Ray out on his route before or after August 22. Ray did not perform any route work at all after August 22, 1979; and because this was the date set forth in the surveillance allegations of the October 1979 complaint, as of the February 1980 hearing Fann had more reason to retain recollection of encounters with Ray on August 22, 1979, than on earlier dates. Although the circumstances are suspicious, I shall dismiss the surveillance allegations set forth in Section 7 of the complaint.

[58] However, I do not agree with Respondent that the surveillance allegation is inconsistent with the absence of evidence that Ray engaged in union activity on his route that day, and with Ray's testimony that he asked Fann where he was going on his next stop and Fann told him. Such evidence in no way militates against the contention that, because of Ray's prior union activity, Respondent was policing his work-related conduct, and was doing so openly in order to make him feel uneasy. See *Florida Steel, supra*, 215 NLRB at 98, relied on by the General Counsel.

2. The alleged discrimination and the alleged forced isolation

On the morning of August 23, Respondent's president told Respondent's employees that, if they were caught signing union cards, they might lose their jobs. That afternoon, Respondent was advised that Tim Ray was a volunteer organizer for the Union. Ray, who was not working that day because of an on-the-job injury, was discharged by Dean before he began work on the following morning, and was told that if he came back on company property any more, except to return his uniforms, Dean would have him arrested. On the next working day, Dean threatened to discharge union activist Kelley because of his union activity. After being advised thereafter that four more employees, including Lewis, were also "volunteer organizers," Dean called each of them into his office individually, inaccurately told them that "Federal law" or "the law" prohibits distribution of literature and solicitation of union cards in working areas and on working time, unlawfully told Lewis that he would be discharged if he exercised his right to carry on union organizing in the company plant, and unlawfully forbade the others to exercise their right to talk about the Union, and to solicit and sign union cards, on company property. Thereafter, and 10 days after Respondent was advised that Lewis was a "volunteer organizer," Respondent discharged Lewis. The foregoing sequence of events indicates, at least *prima facie*, that Ray and Lewis were discharged because of their union activity.

This conclusion as to Lewis is strengthened by Respondent's conduct after Hill advised Respondent that it suspected Lewis of stealing a drink of Mello Yello from Hill. Thus, Respondent proposed to Assistant Store Manager Moore that Lewis be forbidden to come to Moore's store any more, and, after Moore said this would be satisfactory, prepared a written statement for Moore which improved Respondent's case against Lewis by stating that Moore wanted Lewis excluded from all of Hill's stores and strongly implied, to say the least, that this statement was initiated by Moore. Respondent further sought to improve its case against Lewis by including in the statement signed by Moore the inaccurate assertion that he had seen Lewis taking the Mello Yello and trying to conceal its absence from the case by putting another on too. Finally, and most significantly, Respondent took pains to make it as difficult as possible for Lewis to show that he had not in fact stolen the Mello Yello. Thus, Respondent refused during the discharge interview to tell Lewis the nature of the complaint or who had made it, although Lewis serviced a number of stores and (so far as Dean knew) had not been the subject of a previous complaint from any of them. Respondent's secretiveness not only precluded Lewis from giving his version of the incident and made it difficult for him to find out the source and nature of the complaint, but also increased the likelihood that Lewis would (as he in fact did) dis-

card, lose, or mislay his $1.79 receipt for the Mello Yello, which (as Respondent must have known) he would be unlikely to preserve unless he was very promptly made aware of its importance. Further, as Respondent must have known, by keeping Lewis in ignorance for more than 6 weeks about what he had allegedly done, Respondent increased the likelihood that Lewis would forget (as he in fact did) the date he bought the Mello Yello and how much and which cashier he paid for it. Nor is there any evidence that Respondent's conduct was based on a decision to discharge Lewis, not in any belief by it that he had really stolen the Mello Yello, but because a valued customer (Hill) believed that he had done so. On the contrary, Dean testified that Respondent would not have discharged Lewis unless it believed that Hill's complaint was true. I conclude that Respondent discharged Lewis, in violation of Section 8(a)(3) and (1) of the Act, because he was a "volunteer organizer" for the Union, and not because Respondent believed that he had taken the Mello Yello without paying for it.

Dean testified that he discharged Ray for "gross insubordination." As discussed below, Dean's testimonial description of the allegedly motivating "gross insubordination" includes conduct which Dean untruthfully ascribed to Ray. Dean did include in his description of Ray's alleged "gross insubordination" certain things which Ray really did. More specifically, after Bedwell had asked Ray to stay in Bedwell's office, Ray walked out of the open door to that office; after Ray obeyed Dean's instructions to return to the office, Ray said in the hearing of supervisors Bedwell and Richardson and employees Meeks and Tomlin that Ray did not have to comply with Dean's further instructions to "sit down right there in that chair and don't move," which instructions Dean thereupon retracted; and, thereafter, after ascertaining from Dean that management was still not ready to talk to him, Ray concluded his errand of using the public pay telephone in the breakroom before he complied with Dean's instructions to return to Bedwell's office, where he waited 5 to 10 minutes more before summoned to his interview with management.[59] I do not believe that an employee who was not a known "volunteer organizer" organizer for the Union would have been discharged by Respondent for engaging in such conduct, and my conclusion in this respect is supported by Dean's action in including, under the rubric "gross insubordination," things which Ray had not really done; namely, verbally refusing in the presence of two other employees and two supervisors to stay in Bedwell's office, and refusing to see Dean until after Ray had finished using the telephone. I conclude that the real reason for Ray's discharge was his status as a "volunteer organizer" for the Union, that his conduct immediately preceding this discharge was a mere pretext therefor, and, hence, that his discharge violated Section 8(a)(3) and (1) of the Act.

In any event, Ray's discharge violated Section 8(a)(3) and (1) of the Act even assuming that he was really discharged because of his conduct in connection with Bedwell's request to stay in his office until management could talk to Ray. Dean testified that Ray was asked to stay in Bedwell's office because Dean wanted to make him available for a personal interview during which Dean intended to read him the same Krantz-prepared material which Dean subsequently read to four other "volunteer organizers" concerning their supposed rights to distribute union literature and solicit union cards. In other words, Respondent wanted Ray to stay in Bedwell's office in order to direct unfair labor practices at him. Furthermore, I agree with the General Counsel that Respondent's insistence on Ray's remaining in Bedwell's office until management could interview him was motivated by a desire to minimize his contacts with, and thereby his ability to solicit union support from, other employees. I so conclude because of Bedwell's instructions that Ray wait in Bedwell's office, where Ray would be alone, rather than in the salesroom and break areas where the other employees were congregating; Dean's subsequent angrily expressed concern that Ray remain in Bedwell's office rather than wait in the hallway to the home package salesroom, where Dean and Bedwell could readily see him but where two unit employees were still present;[60] Dean's observation of Ray while he was using the telephone in the breakroom, which was then occupied by several other employees; and Dean's action, following Ray's discharge, in unlocking two doors to let him out the front way, when some employees were still outside the back door which Ray would normally have used, and in requiring him to wait across the street from the plant for his wife to pick him up. Accordingly, Respondent's requirement that Ray remain isolated in Bedwell's office constituted in itself a violation of Section 8(a)(1) of the Act. *St. Joseph Hospital East, Inc.*, 236 NLRB 1450 (1978); *S. S. Kresge Co.*, 229 NLRB 10, 17–18 (1977). Finally, the record shows that the August 24 conduct by Ray which allegedly motivated his discharge was to a significant extent provoked by Respondent's unfair labor practices which led Ray correctly to conclude that his instructions to remain in Bedwell's office portended unfair labor practices directed against Ray. On the previous day, Respondent had directed him to defer seeking medical attention for his sore shoulder until after he heard a speech from President Johnson threatening employees with discharge if they signed union cards. This speech had led Ray to seek the

[59] At one point in Dean's testimony, he suggested that Ray could have used the telephone in Bedwell's office. However, there is no evidence that Dean suggested this to Ray when he said that he had to use the telephone before returning to Bedwell's office, and Dean later indicated that the employees were not supposed to use the telephone in Bedwell's office because long-distance calls can be made on that telephone. Although Dean also testimonially suggested that Ray could have used a telephone in one of the district managers' offices, these offices can be reached only through the home package salesroom, and there is no evidence that Dean suggested one of such telephones to Ray. Dean testified that he did not know or ask whether Ray intended to make a long-distance call. Ray's uncompleted call to Union Representative Williams was a local call, but the record fails to show whether this was true as to Ray's calls to his wife's place of employment.

[60] The home package salesroom and office are about 40 by 80 feet. In the morning, about 50 employees congregate in the home package salesroom before beginning their routes. When Dean told Ray to return to Bedwell's office, five individuals were in the home package sales room. No contention is made that Ray was getting in the way of or otherwise interfering with the others' search for the mislaid invoices.

assistance of Union Representative Williams, who with Ray's consent had thereupon sent Respondent a mailgram, received by Respondent on August 23, which set forth Ray's union activity. Ray credibly testified that, on August 24, Dean's conduct in angrily ordering Ray to return to Bedwell's office and sit down made Ray "kind of scared"; Ray rightly attributed Dean's conduct to the mailgram relating Ray's union activity; and after visiting the restroom and drinking from the water fountain (conduct not relied on by Dean as motivating Ray's discharge), and after Dean had told him that management was not yet ready to talk to him, he prolonged his absence from Bedwell's office in order to seek Williams' assistance in handling management's anticipated "intimidation" for union activity—a purpose which would render imprudent the use of the telephone in Bedwell's office. Such employee conduct so provoked and so motivated constitutes an unlawful basis for discharge. *Revere Cooper and Brass, Inc.*, 138 NLRB 1377, 1388-91 (1962), enfd. 324 F.2d 132 (7th Cir. 1963); *John Kinkel & Son*, 157 NLRB 744, 745-746 (1966); *Cone Mills Corp.*, 245 NLRB 159 (1979) (Krumperman).

However, I disagree with the General Counsel that Respondent violated Section 8(a)(1) on September 10 by forcing Lewis to remain isolated in the home package salesroom. It is true that Respondent told him to remain there (but gave him permission to go to the cafeteria to buy a Coke provided he returned immediately) and directed the other employees to wait elsewhere. However, particularly in view of management's dissembling explanation to Lewis for these instructions (namely, that he needed help on his route), I believe that these instructions were motivated by a desire to make sure that Lewis had no nonmanagement witnesses during his discharge interview. While these tactics may have been unjust to Lewis, I know of no cases holding them unlawful, even where (as here) they were directed to a discharge for unlawful reasons. Accordingly, section 14(b) of the complaint will be dismissed.[61]

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by telling employees, through President James E. Johnson, that the plant might close down if it were organized, and that, if employees were caught signing a union card, or got the Union in, they might lose their benefits or pensions, suffer a pay cut, or lose their jobs; by threatening, through Vice President Herbert E. Dean, to discharge employee J. T. Kelley for union activity; by advising employees that signing any document for the Union might cause the Union to repeat alleged prior unethical or illegal conduct which would expose the employees to misidentification and, hence, reprisals as union supporters; by telling employees Kelley and Jerrell Kirby, through Dean, that they were not allowed to sign union authorization cards on company time or company property; by telling employee Phillip Stillwell, through Dean, that he was not allowed to solicit union cards or talk about the Union on company time or company property; by telling employee David E. Lewis, through Dean, that he would be discharged if he carried on union organizing in the company plant or on company time; by requiring known union supporters to attend special, exclusive meetings with management to be lectured about company rules and penalties for violations; and by forcing employee Tim Ray to remain isolated in Supervisor Russell Bedwell's office.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by discharging Tim Ray and David E. Lewis.

5. The unfair labor practices set forth in Conclusions of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act through speeches given by Marvin Krantz; by engaging in surveillance over Tim Ray; or by forcing David E. Lewis to remain isolated in the salesroom.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist thereupon. Such unfair labor practices included the discriminatory discharge of two employees identified to Respondent as volunteer organizers for the Union; threats and other unfair labor practices individually directed at three more "volunteer organizers"; and threats to most of Respondent's employees, assembled by Respondent for the specific purpose of listening to antiunion speeches, to engage in unfair labor practices in the future; namely, plant closure, pay cuts, or loss of jobs or benefits for union activity. Respondent's unfair labor practices were committed by members of top management who at the time of the hearing still occupied such positions; namely, Respondent's president, one of its vice presidents, and a vice president in charge of labor relations for Respondent's corporate parent. I conclude that unless restrained Respondent is likely to engage in continuing and varying efforts in the future to prevent its employees from infringing on such rights. Accordingly, Respondent will be required to refrain from in any other manner infringing on such rights. *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 437-439 (1941); *N.L.R.B.* v. *Southern Transport, Inc.*, 343 F.2d 558, 561 (8th Cir. 1965); *N.L.R.B.* v. *East Texas Pulp & Paper Co.*, 346 F.2d 686, 689-690 (5th Cir. 1965); *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Affirmatively, Respondent will be required to offer Ray and Lewis immediate reinstatement to the jobs of which they were unlawfully deprived, or, if such jobs no

[61] I am aware that in sustaining most of the complaint herein, I have made findings and reached conclusions different from those of the United States District Court for the Middle District of Tennessee in a proceeding brought against Respondent by the Regional Director under Sec. 10(j) of the Act. No contention is made that the district court's findings and conclusions are binding in the instant proceeding under Sec. 10(b) and (c). *N.L.R.B.* v. *Acker Industries, Inc.*, 460 F.2d 649, 652 (10th Cir. 1972). Respondent opposed the General Counsel's hearing motion, not then granted by me and not renewed in his brief, that I take official notice of the 10(j) transcript. The district court's memorandum shows on its face that a number of witnesses who testified before me did not testify during the 10(j) proceeding.

longer exist, to substantially similar jobs, without prejudice to their seniority or other rights and privileges previously enjoyed. In addition, Respondent will be required to make them whole for any loss of pay they may have suffered by reason of the discrimination against them, less net earnings, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as called for in *Florida Steel Corporation*, 231 NLRB 651 (1977).[62] Because of my finding that Lewis was in fact innocent of the alleged misconduct advanced by Respondent as a defense to his discharge, because dissemination of such an accusation might have an unfairly damaging effect on his career, and because any reference thereto in Respondent's personnel files may accidentally be released to third parties, or otherwise used, by persons in Respondent's employ who are unaware of its falsity, Respondent will be required to exercise any reference thereto from Lewis' personnel files. Also, Respondent will be required to post appropriate notices.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[63]

The Respondent, Wometco Coca-Cola Bottling Company of Nashville, Inc., Nashville, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling employees that, if employees are caught signing a union card or get a union in, they might lose their benefits or pensions, suffer a pay cut, or lose their jobs.

(b) Telling employees that the plant might close down if it were organized by a union.

(c) Threatening employees with discharge for union activity.

(d) Advising employees that signing any document for Retail Clerks Union Local 1557, United Food and Commercial Workers International Union AFL-CIO, CLC, might cause the Union to repeat alleged prior unethical or illegal conduct which would expose the employees to misidentification and, hence, reprisals as union supporters.

(e) Forbidding employees, without qualification as to time, to solicit or sign union cards on company property.

(f) Forbidding employees to solicit other employees for a union at times when employees are permitted to solicit other employees for other purposes.

(g) Forbidding employees to talk about a union at times when they are permitted to talk about other subjects.

(h) Forbidding employees to solicit other employees for a union, including soliciting them to sign authorization cards, when neither the employee soliciting nor the employee being solicited is supposed to be actively working.

(i) Forbidding employees to sign union authorization cards, or talk about a union, when such employees are not supposed to be actively working.

(j) Threatening to terminate employees for engaging in the kind of conduct specified in paragraph 1 (e-i).

(k) Requiring known union supporters to attend special, exclusive meetings with management to be lectured about company rules and penalties for violations.

(l) Forcing employees to remain isolated in order to prevent them from encouraging other employees to favor union representation.

(m) Discharging any employee or otherwise discriminating against any employee with regard to his hire or tenure of employment or any term or condition of employment, to discourage membership in the Union or any other labor organization.

(n) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Tim Ray and David E. Lewis reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed; and make them whole for any loss of pay they have suffered by reason of the discrimination against them, in the manner set forth in the part of this Decision entitled "The Remedy."

(b) Remove from the personnel files of David Lewis any references to the offense for which he was allegedly discharged on September 10, 1979.

(c) Post at its Nashville, Tennessee, facility, copies of the attached notice marked "Appendix."[64] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent, shall be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that paragraphs 7, 9, and 14(b) of the complaint are hereby dismissed.

[62] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). The General Counsel's request for a 9 percent interest rate is denied. *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[63] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[64] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT tell you that if you are caught signing a union card, or get a union in, you might lose your benefits or pensions, suffer a pay cut, or lose your job.

WE WILL NOT tell you that the plant may close if it is organized by a union.

WE WILL NOT threaten to discharge you for union activity.

WE WILL NOT tell you that signing any document for Retail Clerks Union Local 1557, United Food and Commercial Workers International Union, AFL-CIO, might cause it to repeat alleged improper conduct which may lead us to think you are union supporters and to punish you for that reason.

WE WILL NOT forbid you, without qualification as to time, to solicit or sign union cards on company property.

WE WILL NOT forbid you to solicit other employees for a union at times when you are permitted to solicit other employees for other purposes.

WE WILL NOT forbid you to talk about a union at times when you are permitted to talk about other subjects.

WE WILL NOT forbid you to solicit other employees for a union, including soliciting them to sign union cards, at times when neither the employee who is soliciting nor the employee who is being solicited is supposed to be actively working.

WE WILL NOT forbid you to talk about the Retail Clerks, or any other union, when you are not supposed to be actively working.

WE WILL NOT threaten to terminate you for engaging in union solicitation during the foregoing periods.

WE WILL NOT require known union supporters to attend special, exclusive meetings with management to be lectured about company rules and penalties for violations.

WE WILL NOT force you to remain isolated from other employees in order to hinder you from asking them to support the Retail Clerks, or any other union.

WE WILL NOT discharge you or otherwise discriminate against you with regard to hire or tenure of employment or any term or condition of employment, to discourage membership in the Retail Clerks or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your rights under the National Labor Relations Act. These rights are:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of your own choosing

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from any such activities.

WE WILL offer Tim Ray and David E. Lewis reinstatement to the jobs of which they were unlawfully deprived or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole, with interest, for any loss of pay they may have suffered by reason of their discharge.

WE WILL remove from David Lewis' personnel file any reference to the reason which we gave for firing him in September 1979.

Our employees are free to exercise any or all of these rights, including the right to join or assist the Retail Clerks or any other union. Our employees are also free to refrain from any or all such activities.

WOMETCO COCA-COLA BOTTLING COMPANY OF NASHVILLE, INC.